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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER N. PERRETTI, JR.,
Attorney General of New Jersey,

Petitioner,

vs.

GLEN FULLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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June 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Third Circuit properly concluded, without prior precedent from this Court and in conflict with other federal precedent, that a state criminal defendant's qualified right to counsel of choice, as contemplated by the Sixth Amendment of the United States Constitution, encompasses a defendant's right to have out-of-state counsel admitted *pro hac vice*.

2. Whether the court of appeals properly concluded, in conflict with this Court's opinion in *Wheat v. United States*, 486 U.S. ___, 108 S. Ct. 1692 (1988), and other federal precedent, that an improper denial of a state criminal defendant's right to counsel of choice is *per se* reversible error.

3. Whether the district court and the court of appeals properly deferred to the factual conclusions of the state trial court as required under Title 28 U.S.C. sec. 2254(d).

PARTIES BELOW

Only Peter N. Perretti, Jr., Attorney General of New Jersey, and respondent Glen Fuller remain party to this petition.

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IN THE

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OCTOBER TERM, 1988

No. ___

PETER N. PERRETTI, JR.,
Attorney General of New Jersey,

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VS.

GLEN FULLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Peter N. Perretti, Jr., Attorney General of the State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on February 24, 1989, and from the denial on March 24, 1989 of a timely petition for rehearing.

OPINIONS BELOW

The oral opinion of the Superior Court of New Jersey, Law Division (Hamlin, J.S.C.) has not been reported. It is reprinted as Appendix I, p. 77a, *infra*.

The written opinion of the Superior Court of New Jersey, Appellate Division (Greenberg, P.J.A.D.) is reported at 211 N.J. Super. 321, 511 A.2d 1197 (App. Div.), *certif. denied*, 107 N.J. 45, 526 A.2d 135 (1986), and is reprinted as Appendix G, p. 47a, *infra*.

The written opinion of the United States District Court, District of New Jersey (Ackerman, D. J.), is not reported. It is reprinted as Appendix D, p. 29a, *infra*.

The written opinion of the Court of Appeals for the Third Circuit is reported at 868 F.2d 604 (3d Cir. 1989), and is reprinted as Appendix A, p. 1a, *infra*.

JURISDICTION

On February 24, 1989, the United States Court of Appeals for the Third Circuit in its opinion to which *certiorari* is sought affirmed the district court's order granting respondent's request for a writ of *habeas corpus*. Thereafter, on March 24, 1989, the court of appeals denied a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1) and Rule 20.1.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have com-

pulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTE INVOLVED

UNITED STATES CODE ANNOTATED TITLE 28
section 2254(d)(West 1987)

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(l) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his consti-

tutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraph number (l) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence

that the factual determination by the State court was erroneous.

NEW JERSEY COURT RULE INVOLVED[1]

RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY
R. 1:21-2
(Gann 1981)

1:21-2. *Appearances Pro Hac Vice*

An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual, or a member or employee of a partnership, or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this State, of good standing, who is not domiciled in this State and who does not maintain in this State his principal office for the practice of law, may, at the discretion of the court in which any matter is pending, be permitted, pro hac vice, to speak in such matter in the same manner as an attorney of this State who is domiciled in and maintains a bona fide office for the practice of law in this State or maintains in this State his principal office for the practice of law; and who is therefore, pur-

[1] For the convenience of this Court, the court rule governing the appearance of counsel *pro hac vice* in New Jersey which was in effect on July 2, 1981, the pertinent date herein, has been reproduced in this section. The court rule involved has been subsequently amended essentially to codify pertinent case law; the amended rule is reproduced for this Court's convenience in petitioners' Appendix J.

> suant to R. 1:21-1(a) authorized to practice in this State; provided, however, that all pleadings, briefs and other papers filed with the court shall be signed by an attorney of record authorized to practice in this State, who shall be held responsible for them and for the conduct of the cause and of the admitted attorney therein.

STATEMENT OF THE CASE

This case squarely presents this Court with the opportunity to remove the confusion which currently exists in the lower courts with respect to whether *pro hac vice* counsel is encompassed within the right to "counsel of choice" secured by the Sixth Amendment and, if so, whether this Court's opinion in *Wheat v. United States*, 486 U.S. ___ , 108 S. Ct. 1692 (1988), mandates that any violation of the Sixth Amendment right to counsel of choice be subjected to a harmless error analysis. This case has evolved from the granting of a writ of *habeas corpus* pursuant to 28 U.S.C. sec. 2254 which was affirmed by the United States Court of Appeals for the Third Circuit.

The following sequence of events gives rise to the matter presently before this Court. Douglas Chappee and Respondent Glen Fuller were charged in Middlesex County New Jersey Indictment No. 938-80, filed on February 27, 1981, with various narcotics offenses and unlawful possession of a weapon. (App. A, at p. 3a).

On July 2, 1981, the Honorable C. Judson Hamlin, J.S.C., heard and denied codefendant Chappee's motion to have a Colorado attorney appear *pro hac vice* on his behalf. Respondent's motion for *pro hac vice*

counsel was not decided on that day due to his counsel's failure to appear. (App. H, at pp. 66a-67a).

On July 9, 1981, the trial court heard arguments from respondent's counsel on his motion to have an attorney from the District of Columbia and one from Illinois represent him *pro hac vice*. The judge was faced with out-of-state defendants from two distant jurisdictions (Chappee resided in Massachusetts, while Fuller lived in Colorado) who wished to admit three out-of-state counsel from Colorado, Illinois, and the District of Columbia. Both defendants were free on bail. Admission of counsel would leave the court with the nearly impossible task of coordinating the appearances of five people from four different areas of the country. Further, at that time an air traffic controllers' strike was imminent. Finally, the court was concerned with the crowded court calendar and the speedy trial requirements of the New Jersey courts. After extensive arguments by counsel, the court, in a lengthy oral opinion, denied respondent's motion. (App. I, at pp. 92a-100a). The court was of the opinion that the case was simple, local counsel was competent to handle it, local counsel and out-of-state counsel had not coordinated properly as required by local rules, and the potential for delay in attempting to coordinate the schedule of three attorneys and two defendants from four different and far-flung jurisdictions outweighed respondent's qualified right to counsel of choice. The court agreed to give respondent an opportunity to appeal his ruling. (App. I, at pp. 100a-102a).

Respondent requested leave to appeal to the Superior Court of New Jersey, Appellate Division, which court denied leave to appeal the trial court's order

denying *pro hac vice* representation. Respondent also requested leave to appeal to the Supreme Court of New Jersey, which was denied.

On April 10, 1984, codefendant Chappee and respondent appeared before the Honorable Joseph F. Deegan, Jr., J.S.C., and entered *retraxit* pleas of guilty to Count Four of the indictment (possession of cocaine with intent to distribute). These pleas were entered pursuant to a plea agreement whereby the State of New Jersey agreed to make no recommendation as to sentence, other than that incarceration was necessary, but would recommend dismissal of the remaining counts of the indictment against Chappee and respondent. In accordance with N.J. Ct. R. 3:9-3(f), Chappee and respondent individually reserved the right to raise certain legal issues for purposes of appeal, including the *pro hac vice* denial, notwithstanding entry of their guilty pleas. (App. G, at p. 50a).

On November 20, 1984, respondent was sentenced by Judge Deegan to the custody of the Commissioner of the Department of Corrections for a term of 20 years imprisonment on Count Four (possession of more than 3.5 grams of free base cocaine with intent to distribute) and received a fine of $20,000. The judge also dismissed the remaining counts in accordance with the plea agreement and gave respondent credit for time served. (App. G, at p. 50a).

On January 16, 1985, respondent filed a notice of appeal to the Superior Court of New Jersey, Appellate Division. Similarly, on May 2, 1985, codefendant Chappee filed a notice of appeal to the appellate division. In a published decision the appellate division affirmed both Chappee's and respondent's convictions,

ruling in part that Judge Hamlin properly exercised his discretion in denying admittance of defense counsel *pro hac vice*. *State v. Chappee*, 211 N.J. Super. 321, 324-25, 511 A.2d 1197, 1204-05 (App. Div.), *certif. denied sub nom. State v. Fuller*, 107 N.J. 45, 526 A.2d 135 (1986). (App. G, at p. 47a). The Supreme Court of New Jersey denied respondent's petition for certification. 107 N.J. 45, 526 A.2d 135 (1986). (App. F, at p. 46a).

Subsequently, on June 16, 1987, respondent filed a petition for writ of *habeas corpus* with the United States District Court for the District of New Jersey. Petitioner Attorney General of New Jersey filed his answer on July 20, 1987.[2] The district court granted respondent's request for a writ on February 10, 1988. By order dated March 4, 1988, the court vacated the order of February 10 and requested additional briefing.[3]

On May 10, 1988 the district court issued its amended opinion and order again granting respondent's request for a writ of *habeas corpus*. The district court found that the existence of capable local counsel was not sufficient to overcome respondent's right to counsel of choice. The district court found

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[2] Warren Diesslin, the Superintendent of Buena Vista Correctional Facility, Buena Vista, Colorado, was also a named defendant to the petition as respondent was then incarcerated at that facility on unrelated charges. Respondent has since been paroled from that facility and, consequently, Superintendent Diesslin is no longer a party to this petition.

[3] Prior to receiving the district court's order vacating the opinion and order granting the writ, petitioner Attorney General of New Jersey had filed a notice of appeal from that order. That appeal was subsequently withdrawn on petitioner's motion.

the state court's ruling was premised upon a presumption that in-state counsel would be more knowledgeable with respect to state law and rules and that this distinction was without merit. (App. D, at p. 41a). The district court also found that the state court's findings with respect to delay were merely speculative and that there was no basis for finding that admission of these attorneys would cause delay. The district court concluded that the state trial judge denied respondent's motion with a *per se* ruling that out-of-state counsel would delay the case and that this ruling deprived respondent of his right to counsel of choice. (App. D, at p. 43a). The court also noted that denial of this right is *per se* reversible and does not require a showing of prejudice to the criminal defendant. (App. D, at pp. 43a-44a). On June 8, 1988, petitioner Attorney General of New Jersey timely filed a notice of appeal with the court of appeals.

On February 24, 1989, the court of appeals, through a majority opinion authored by the Honorable Edward R. Becker, Circuit Judge, affirmed the grant of the writ, holding that the qualified right to counsel of choice encompassed the right to *pro hac vice* representation, that violation of this right was *per se* reversible error notwithstanding *Wheat v. United States*, 486 U.S. ___, 108 S. Ct. 1692 (1988), and finally, that the right to counsel of choice had been arbitrarily denied in this case. (App. A, at p. 1a). The Honorable Joseph F. Weis, Circuit Judge, dissented, stating that respondent's right to counsel of choice was not violated in this case. (App. A, at p. 19a).

Petitioner Attorney General of New Jersey filed a timely petition for rehearing on March 6, 1989. The United States Court of Appeals for the Third Circuit

denied the petition for rehearing on March 24, 1989. (App. C, at p. 27a). At the time of this denial, respondent was still incarcerated in Colorado, and therefore, petitioner did not move to stay the mandate of the court of appeals. In accordance with Fed. R. App. Proc. 41, the mandate of the court of appeals issued on March 31, 1989.

On May 25, 1989, respondent was paroled from the Buena Vista Correctional Facility in Colorado. In light of this changed circumstance, petitioner moved, on June 1, 1989, before the court of appeals for an order vacating and recalling the mandate pending filing of the within petition. To date, the court of appeals has taken no action with respect to petitioner's motion.

REASONS FOR GRANTING THE WRIT

A. There is a Split in the Circuits as to Whether the Right to Counsel of Choice Encompasses a Right to Counsel *Pro Hac Vice*; the Court of Appeals Erroneously Concluded that a Sixth Amendment Right To Counsel *Pro Hac Vice* exists.

In its opinion the United States Court of Appeals for the Third Circuit, while recognizing the lack of an explicit determination by this Court as to whether there is a right to counsel *pro hac vice* included within the right to counsel of choice, concluded that "the right to counsel *pro hac vice* is encompassed analytically within the right to counsel of choice" component of the Sixth Amendment. (App. A, at p. 7a). This conclusion is in direct conflict with the opinion of at least one other federal circuit court which has ruled that a defendant has no right to have counsel appointed outside the state, *Bedrosian v. Mintz*, 518 F.2d 396, 400-02 (2d Cir. 1975), and is in apparent

conflict with another circuit court which has impliedly found no right to the appointment of out-of-state counsel where competent in-state counsel is available. *Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975). Only one circuit court opinion provides arguable support for the position adopted by the Third Circuit. *See United States v. Panzardi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987) (indicating that admission of defendant's counsel *pro hac vice* implicates constitutional concerns, but doing so only in the context of a peculiar Puerto Rican court rule which allowed out-of-state counsel to appear only once a year). Thus, the present case affords this Court with the opportunity to eliminate the conflict currently existing among the federal courts and to determine whether the request of a defendant for out-of-state counsel is encompassed in the right to counsel of choice component of the Sixth Amendment. Without a definitive ruling from this Court, the lower courts will continue to be in a state of conflict, as they attempt to properly assess a defendant's request for out-of-state counsel within the context of a state's important interest in maintaining control over those individuals practicing law within its borders.

The Sixth Amendment guarantees a criminal defendant the right "to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. There is no question that a component of this right is the protection of a defendant's opportunity to obtain counsel of his choice. *Powell v. Alabama*, 287 U.S. 45, 53 (1932). The Sixth Amendment does not, however, assure the absolute right to the particular counsel of his choice. *See Morris v. Slappy*, 461 U.S. 1, 13-14 (1983). While a defendant's choice may not

be denied arbitrarily, a defendant's right to choose his own counsel must be balanced against the fair and proper administration of justice. *United States v. Rankin*, 779 F.2d 956, 958 (3d Cir. 1986); *United States v. Laura*, 607 F.2d 52, 55 (3d Cir. 1979). *See also United States v. Panzardi Alvarez*, 816 F.2d at 816. The essential aim of the Sixth Amendment is to guarantee an effective advocate for a defendant, not to ensure that a defendant is inexorably represented by the lawyer or lawyers he prefers. *Wheat v. United States*, 486 U.S. ___, 108 S. Ct. 1692, 1697 (1988).

When a defendant chooses out-of-state counsel, however, clearly there are compelling state interests involved as well, that is, the regulation and licensing of attorneys who practice before the state court and the court's control of its trial calendar to avoid inordinate delay. On several occasions, this Court has recognized the importance of these state interests. It is clear, for example, that out-of-state counsel have no constitutional right to practice in a state in which they have not been admitted to the bar. *Leis v. Flynt*, 439 U.S. 438 (1979). Similarly, a criminal defendant does not have an unconditional right to choose as his counsel an individual who is not admitted to practice law in the state in which his trial is being held. *Ross v. Reda*, 510 F.2d at 1172. Moreover, this Court has previously upheld state bar rules that prohibited out-of-state counsel from practicing within the state altogether or on a case-by-case basis. *Leis v. Flynt*, 439 U.S. at 443. *See Norfolk & Western Ry. Co. v. Beatty*, 423 U.S. 1009 (1975), *summarily aff'g* 400 F. Supp. 234 (S.D. Ill.); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), *summarily aff'g* 359 F. Supp. 549 (E.D. Va.). Indeed, no one has seriously suggested

that local bar admission requirements must fall if a defendant chooses to have counsel who do not meet those local requirements. *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977). By virtue of its conclusion that a defendant's right to counsel of choice encompasses the right to counsel *pro hac vice*, however, the court of appeals has sanctioned the right of a defendant to choose counsel who are not members of the bar as freely as he would a local attorney, thus greatly diminishing the state's legitimate control over the persons who may be licensed to practice law and rendering virtually nugatory this Court's decisions which allow a state to exclude out-of-state counsel from practicing within its borders.

It is important to emphasize that this Court has never ruled on the question of the impact of a defendant's Sixth Amendment right to counsel of choice upon a state's right to regulate the admission of out-of-state attorneys *pro hac vice*. *Leis v. Flynt*, 439 U.S. at 443 n.4, 446 n.2. The New Jersey courts have held, however, that there is no constitutional right to representation by out-of-state counsel. *State v. Kavanaugh*, 52 N.J. 7, 18, 243 A.2d 225, 231, *cert. denied*, 393 U.S. 924 (1968).[4]

On the federal level, as previously indicated, there is a split among the circuits as to whether a denial of a defendant's motion to have an attorney represent him *pro hac vice* can be a denial of his Sixth Amendment right to counsel of choice. At least one circuit has ruled that a defendant has no right to have

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[4] Thus, a conflict also appears between the Third Circuit and the Supreme Court of New Jersey.

counsel appointed from outside the state. *Bedrosian v. Mintz*, 518 F.2d at 400-02; *see also Ross v. Reda*, 510 F.2d at 1173 (implying no right where competent local counsel available). Caselaw reveals that only the United States Court of Appeals for the First Circuit has ruled contrarily on the question of out-of-state counsel, holding that admission of defendant's counsel of choice to practice *pro hac vice* may not be denied arbitrarily on the basis of a local court rule allowing out-of-state counsel to appear only once a year, thereby implicitly holding that there is a constitutional right to such representation. *United State v. Panzardi Alvarez*, 816 F.2d at 816, 817. Although *Panzardi* stated that the admission of the defendant's counsel *pro hac vice* implicates constitutional concerns, it did so solely in the context of discussing the peculiar rule used in Puerto Rico, and it did not discuss the jurisdiction's interest in controlling the admission of persons to its bar and in controlling its courts. 816 F.2d at 816. Thus, the court assumed such a right existed without really discussing it.

Despite the obvious murkiness in which the state of the law now exists and the lack of any real support for its opinion, the court of appeals has explicitly concluded that the right to counsel of choice component of the Sixth Amendment contemplates the right to out-of-state counsel. In so doing, the court of appeals virtually has ignored the compelling interest the state has in regulating those attorneys who are allowed to practice within its borders, as well as the important interest state courts have in controlling their calendars, although explicitly recognizing the reality that "the number of occasions on which a defendant will desire to be represented by counsel

pro hac vice is frequent and will be increasingly so." (App. A, at p. 7a).

There are significant reasons why a Sixth Amendment right to choose out-of-state counsel should not exist, at least where there has been no showing that local counsel was incompetent or would refuse to represent a defendant. *See Powell v. Alabama*, 287 U.S. at 45; *Lefton v. City of Hattiesburg, Miss.*, 333 F.2d 280 (5th Cir. 1964). The states retain an obvious and important interest in maintaining control over those persons practicing law within their borders. *See Leis v. Flynt*, 439 U.S. at 443, and cases cited therein. Those interests cannot be vindicated if any time a criminal defendant demands out-of-state counsel, the state courts are required to admit them. Such a rule makes local rules on bar admission meaningless. In effect, such a ruling gives criminal defendants and the federal courts control over admission to practice law in state courts. It places a burden on the state to demonstrate why counsel should not be admitted. The traditional function of the state courts to determine the qualifications of those who seek to practice law in the jurisdiction (*see Middlesex County Ethics Committee v. Garden*, 475 U.S. 423, 434 (1982)) would be vitiated.

Indeed, traditionally, this Court has deferred to and recognized the importance of a state's procedural rules. *See, e.g., Engle v. Isaac*, 456 U.S. 107 (1982); *Kugler v. Helfant*, 421 U.S. 117 (1975). This is particularly true with respect to control over admission to a state's bar. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). Moreover, as previously indicated, this Court has always recognized that the admission of counsel *pro hac vice* is purely

discretionary and has upheld state bar rules that excluded out-of-state counsel from practice altogether. *Leis v. Flynt*, 439 U.S. at 443; *see Norfolk & Western R. Co. v. Beatty*, 423 U.S. at 1009. As this Court noted in *Leis*, ". . .the Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another." 439 U.S. at 443. These rulings become meaningless if a criminal defendant can demand out-of-state counsel no matter what the state bar rules provide. The Sixth Amendment simply cannot be read to guarantee an unconditional right for a criminal defendant to be represented by an out-of-state attorney. *Ross v. Reda*, 510 F.2d at 1173. The erroneous ruling of the court of appeals cannot be allowed to stand, therefore, particularly where, as was the case here, a defendant has not been denied adequate representation by local counsel. If the opinions of this Court recognizing the discretion and important interest of the states in regulating and licensing the attorneys who are allowed to practice within their borders, are not to be rendered meaningless along with the bar requirements of the various states, then this Court must grant review of the court of appeals' decision.

B. There is a Split in the Circuits as to Whether the Denial of a Defendant's Right to Counsel of Choice can be Harmless Error; *Wheat v. United States* has been Misapplied By the Third Circuit.

There is a split among the state[5] and federal courts as to whether a harmless error analysis should be

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[5] *Compare State v. Chappee*, 211 N.J. Super. 321, 511 A.2d 1197 (App. Div. 1986), *certif. denied sub nom. State v. Fuller*,

(cont'd)

applied to cases where a defendant alleges that he has been denied counsel of choice.

Several courts of appeal, including the Court of Appeals for the Third Circuit, have held that the improper denial of a defendant's counsel of choice is *per se* reversible and no showing of prejudice need be made. *See, e.g., United States v. Rankin*, 779 F.2d 956 (3d Cir. 1986); *see also United States v. Romano*, 849 F.2d 812 (3d Cir. 1988); *United States v. Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987); *Linton v. Perini*, 656 F.2d 207 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982). The Eighth Circuit, on the other hand, has applied a harmless error rule. *Williams v. Nix*, 751 F.2d 956 (8th Cir.), *cert. denied*, 471 U.S. 1138 (1985).The question has never been definitively resolved by this Court. *See Flanagan v. United States*, 465 U.S. 259, 268 (1984). However, this Court's decision in *Wheat v. United States*, 486 U.S. ___, 108 S. Ct. 1692 (1988), which the Third Circuit chose not to follow, strongly indicates that the harmless error rule should be applied. This Court has the opportunity to clarify the law, resolve the split and to ensure that *Wheat* will be uniformly and properly applied.

Petitioner submits, as the majority in *Fuller* recognized, that this Court's treatment of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984), and denial of counsel of choice in the area of attorney conflicts of interest in *Wheat v. United States*, has undercut seriously the rationale behind the Third Circuit's rule presuming prejudice

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107 N.J. 45, 526 A.2d 1197 (1986) *with Anaya v. People*, 764 P.2d 779 (Col. 1988). Indeed, *Chappee* demonstrates a conflict between the New Jersey state courts and the Third Circuit on this question.

as originally set forth in *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979), and followed in *United States v. Rankin*, 779 F.2d 956, 960 (3d Cir. 1986), and *United States v. Romano*,[6] 849 F.2d 812 (3d Cir. 1988).

In *Rankin* the Third Circuit quoted the following language from *Flanagan* in support of its conclusion that denial of the right to counsel of choice could never be harmless.

> 'Obtaining reversal for violation of such a right does not require showing any prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.'

Rankin, 779 F.2d at 960 (citing 465 U.S. at 268).

Petitioner submits, with all due respect, that this language was merely a summary of the arguments advanced by the petitioners in *Flanagan*, which involved the appealability of a disqualification order before trial. This Court's comment, in the context of deciding whether a collateral order was appealable, was merely that *if*, on the one hand, the right to counsel of choice is like the Sixth Amendment right to self-representation as denial of counsel altogether, then a showing of prejudice was not required. *Flanagan v. United States*, 465 U.S. at 267-68. This Court went on to say that on the other hand, the asserted

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[6] While *Romano* was decided shortly after the decision in *Wheat*, it contains no reference to the *Wheat* decision. The majority in *Fuller* assumed that the panel considered the case and rejected its application. (App. A, at p. 3a n.l). Petitioner is unsure whether *Wheat* was considered by the *Romano* court because the opinion does not mention, much less discuss, the case.

right may be one which is not violated absent some demonstrable prejudice. *Id.* at 268. This Court concluded that it need not decide the issue because in any event the disqualification order still would not be appealable. *Ibid.* In sum, this Court did not decide the issue of whether prejudice was required to be shown for a denial of the right to counsel of choice. *Ibid. See United States v. Washington*, 797 F.2d 1461, 1467 n.7 (9th Cir. 1986). In other words, this Court never decided whether the right to counsel of choice should be treated as the right to counsel or the right to self-representation, or rather, as the right to effective assistance of counsel.

The Third Circuit, in *Rankin*, stated that the right to counsel of choice is similar to that of self-representation and concluded that no prejudice need be shown. As the majority in *Fuller* acknowledged, this conclusion has been called into question by this Court's recent decision in *Wheat v. United States*. While *Wheat* specifically involved the disqualification of chosen counsel because of a potential conflict of interest, the language regarding the right to counsel of choice is instructive.

> The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defense." In *United States v. Morrison*, 449 U.S. 361, 364 (1981), we observed that this right was designed to assure fairness in the adversary criminal process. Realizing that an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system, *Powell v. Alabama*, 287

> U.S. 45, 69 (1932); *United States v. Ash*, 413 U.S. 300, 307 (1973), we have held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime. *Gideon v. Wainwright*, 372 U.S. 335 (1963). We have further recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States v. Cronic*, 466 U.S. 648, 657, n. 21 (1984). Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983); *Jones v. Barnes*, 463 U.S. 745 (1983).

108 S. Ct. at 1696-97. As the *Fuller* majority acknowledged, if the purpose of the right to select counsel, like the right to effective assistance of counsel, is to ensure an effective advocate for a criminal defendant, then making a violation of the right *per se* reversible without a showing of prejudice makes no sense. (App. A, at pp. 9a-10a). The right to choose

one's counsel is not like the right to represent oneself.[7] *Wheat v. United States*, 108 S. Ct. at 1697 n.3. Nor is it like the right to counsel. That right is fundamentally essential to the right to a fair trial and a violation could never be harmless error. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *see Chapman v. California*, 386 U.S. 18, 23 n.8 (1967). Indeed, unlike the right to counsel, the right to counsel of choice is never absolute. *Davis v. Stamler*, 650 F.2d 477, 479 (3d Cir. 1981); *see Morris v. Slappy*, 461 U.S. 1, 13-14 (1983). The right to counsel of choice is more akin to the right to effective assistance of counsel because that is what the right to counsel of choice is designed to secure. Thus, a standard similar to that espoused in *Strickland v. Washington*, 406 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), should be used. That is, a defendant who demonstrates that his right to counsel of choice was violated should be required to demonstrate prejudice from the denial of that right. It seems anomalous to require a finding of prejudice for a violation of the Sixth Amendment right to counsel in the context of the adequacy of a defendant's representation by counsel or where inadequate representation is shown, but not in the context of the right to choose counsel—a right which is not absolute and which is given

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[7] In a footnote in *Wheat* this Court stated that:

> Our holding in *Faretta v. California*, 422 U.S. 806 (1975), that a criminal defendant has a Sixth Amendment right to represent *himself* if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel.

108 S. Ct. at 1697 n.3 (emphasis in original).

merely to secure the right to effective representation. Accordingly, petitioner submits that a violation of respondent's right to choose counsel should not result in automatic reversal of his otherwise valid conviction. *Williams v. Nix*, 751 F.2d at 959-60.

Acknowledging the force of the above arguments, the majority in *Fuller* nevertheless decided not to follow this Court's opinion in *Wheat* because it was not sufficiently "concrete." (App. A, at p. 12a).[8] It instead chose to follow its own precedent, precedent which it acknowledged was severely diluted by this Court's decisions in *Wheat* and *Strickland*. Petitioner urges this Court to afford the guidance requested by the Third Circuit on this issue.

It is submitted that this case is an ideal vehicle for resolution of the question of harmless error by this Court. In the case at bar, the fact that respondent received excellent representation by local counsel was never challenged. Indeed, the New Jersey appellate court made the following findings in passing on respondent's right to counsel of choice claim:

> We also point out the following. We have given this case an intensive review. While we do not suggest that the absence of discernable [*sic*] prejudice from denial of defendants' motions for admission of counsel *pro hac vice* in itself precludes defendants from obtaining relief by reason of the denial, we nevertheless think it appropriate to state that from

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[8] Alternatively, the majority said that an *en banc* opinion by the Third Circuit would also suffice absent a more specific statement by this Court. Petitioner moved for reconsideration *en banc*; the Third Circuit denied the motion. (App. C, at p. 27a).

> our study of the record, the briefs on appeal and observation of defendants' attorneys at oral argument, it is clear defendants have received extremely competent representation both in the trial court and here. Indeed we are satisfied that beyond any doubt even if defendants had been represented by the attorneys denied admission they could not have received more competent representation or a better result. We point out that defendants almost asked to be arrested. They were speeding on the turnpike in the early morning hours with marijuana in plain view. Further, they did not even have proper papers for the car. The case against them was overwhelming and their guilt clear beyond doubt. Yet skilled counsel has raised every conceivable defense on their behalf and has turned what should have been a routine case into a massive and protracted struggle. The trial judge's anticipation that New Jersey counsel would ably conduct the defense has been vindicated.

State v. Chappee, 211 N.J. Super. 321, 335, 511 A.2d 1197, 1205 (App.Div.), *certif. denied sub nom. State v. Fuller*, 107 N.J. 45, 526 A.2d 135 (1986). (App. G, at pp. 63a-64a).

Respondent clearly had not just adequate representation but excellent representation from his local counsel. Counsel opposed the state at every conceivable juncture. Respondent does not claim that other counsel could have achieved a better result. Since the right to counsel of choice is merely a mechanism for ensuring a defendant's right to effective assistance,

it makes little sense to reverse a conviction where, as here, it is clear beyond any doubt that a defendant received effective assistance.[9] The freedom to choose one's counsel should not be used as a device to manipulate or subvert the orderly procedure of the courts or the fair administration of justice. *Cf. United States v. Casey*, 480 F.2d 151 (5th Cir.), *cert. denied*, 414 U.S. 1045 (1973). Since respondent can point to no prejudice from the alleged violation of his rights, petitioner submits that the district court erred in issuing the order for a writ of *habeas corpus*.

In sum, there is great confusion in the federal and state courts as to whether the denial of counsel of choice is subject to a harmless error analysis. Clarification of this issue and a determination as to whether *Wheat* is to be applied in these circumstances are urgently needed. This case presents this Court with the ideal factual and legal scenario to resolve these questions and end the conflict in the lower courts.

C. Neither the District Court nor the Court of Appeals Gave Proper Deference to the State Trial Court's Factual Findings as Required Under Title 28 U.S.C. section 2254(d).

This Court has recognized repeatedly that questions of historical fact[10] "must be determined, in the first

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[9] Respondent has never challenged the efficacy of his representation by local counsel; indeed, respondent was represented in the federal courts by counsel who was a member of the same firm which represented respondent's codefendant in the state courts.

[10] This Court has defined the phrase "historical fact" as "facts 'in the sense of a recital of external events and the credibility (cont'd)

instance, by state courts and deferred to, in the absence of 'convincing evidence' to the contrary, by the federal courts." *Rushen v. Spain*, 464 U.S. 114, 120 (1983), *reh'g denied*, 465 U.S. 1055 (1984) (quoting *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983)). The need for such deference stems, in part, from the reality that the state courts are in a far better position to properly and completely assess the multitude of factual issues presented during the course of a trial. *See Rushen v. Spain*, 464 U.S. at 120; *Marshall v. Lonberger*, 459 U.S. at 432.

Further, the deference requirement embodied in 28 U.S.C. sec. 2254(d) was ". . .intended by Congress as [a] limitation on the exercise of [the first jurisdictional grant by Congress to the federal courts.]" *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981). Thus, this Court has recognized repeatedly its "duty . . .to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded." *Ibid.*

New Jersey allows the admission of out-of-state counsel *pro hac vice* by court rule.[11] By virtue of this rule, New Jersey trial courts are required to consider not only the defendant's desire for a particular counsel, but also whether good cause exists for the admission of out-of-state counsel. This decision involves considerations such as the complexity of the

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of their narrators . . . .'" *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1983) (quoting *Brown v. Allen*, 344 U.S. 443, 506, *reh'g denied*, 345 U.S. 946 (1953) (opinion of Frankfurter, J.)).

[11] The district court erroneously referred to a later amended version of N.J. Ct. R. 1:21-2 in its decision. (App. D, at p. 35a). The amended version of this rule is reproduced in this Petition as Appendix J, while the version in effect at the pertinent time of this case is reproduced in the text at p. 5, *supra*.

case, the qualifications of out-of-state counsel and the availability of qualified local counsel. Indeed, *N.J. Ct. R.* 1:21-2, as amended, now expressly sets forth these requirements. Prior to this amendment, and at the time of respondent's motion, such considerations were necessitated by caselaw. *See State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968); *State v. Lanza*, 60 N.J. Super. 139, 142-43, 158 A.2d 355, 358 (App. Div. 1960). As will be discussed *infra*, the state trial judge, contrary to the findings of the district court and the majority of the Third Circuit's panel, did not abuse his discretion and arbitrarily deny respondent's motion to have counsel admitted *pro hac vice*; rather, he carefully balanced all relevant factors.

In the case at bar, respondent requested that the court admit not just one out-of-state counsel, but two: an attorney from Illinois and one from the District of Columbia. At the same time codefendant Chappee requested that the court admit an attorney from Colorado. Additionally, the two defendants, both of whom were free on bail, were from two distant jurisdictions (Chappee resided in Massachusetts, while Fuller lived in Colorado). Thus, the judge was faced with requests to admit three out-of-state counsel from three different and distant jurisdictions, as well as having to contend with two out-of-state defendants from different areas of the country. The judge carefully considered the requests for admission of counsel *pro hac vice*; his discussion spans some 17 pages in the transcript. (See App. I). The state trial judge specifically found that the case was not complex (indeed it was a routine turnpike automobile stop), that local counsel were well able to handle the matter, and that it would

be extremely difficult to accommodate the scheduling of three out-of-state counsel from three different jurisdictions in different parts of the country, thereby almost inevitably causing delay in the proceedings. In this respect, the judge also took note of the imminent probability of an air traffic controllers' strike. The judge further noted that out-of-state counsel had not coordinated properly with local counsel as provided by the court rule. The judge thus denied the *pro hac vice* requests.

What is of particular importance is that it is on the very basis of the trial court's reasoned decision that Judge Weis dissented from the court of appeals majority decision. Indeed, as Judge Weis' dissent cogently and forcefully notes, the state trial court here gave proper and detailed reasons for the denial of the *pro hac vice* motion. (App. A, at pp. 19a-21a). The judge's actions were not "wooden" or automatic as the majority has characterized them; rather they reflected a thoughtful concern for the balancing of a hectic and crowded trial calendar with respondent's rights. (App. A, at p. 15a).

Despite the trial court's recitation of such compelling factors, the district court and the majority of the court of appeals nevertheless dismissed the court's reasoning, concluding, in part, that the trial court's concern that use of out-of-state counsel would necessarily result in delays was a "rote application of [a] kind of blanket generalization [which left] 'no room for the exercise of discretion.'" (App. D, at p. 42a) (quoting *United States v. Panzardi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987)).

There is no question that the trial court was concerned with delay in this case. But delay can be, and

petitioner submits *is* in this case, sufficient to countervail a defendant's request for out-of-state counsel, indeed, even a defendant's qualified right to counsel of choice. As the dissent cogently states ". . . accommodating one defendant in scheduling might prejudice the rights of another whose trial would be accelerated or delayed." (App. A, at p. 22a). *See United States v. Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979). Moreover, as this Court has explicitly recognized, and Judge Weis clearly noted in his dissent (App. A, at p. 22a), it is imperative that trial courts be given wide latitude in controlling their trial calendars. *See Morris v. Slappy*, 461 U.S. 1, 11 (1983). Obviously there is no way a trial court may predict with absolute certainty that delay will occur; it should suffice that the court concludes on the basis of the evidence before it that delay may occur and denies the motion for *pro hac vice* representation for that reason. *Cf. Wheat v. United States*, 486 U.S. ___ , 108 S. Ct. 1692 (1988).

Petitioner submits that the reasons for the trial court's denial of the *pro hac vice* motion were amply supported by the record and were not arbitrary. The rulings by the majority and the district court to the contrary are, as the dissent points out, based upon a mischaracterization of the trial court's ruling as resting on *per se* factors. (App. A, at pp. 22a-23a).

In view of the district court's refusal to properly defer to the trial court's findings, the opinion of the court of appeals affirming the district court's reasoning must be reviewed by this Court. The opinions of both the district court and the court of appeals serve to accomplish nothing more than to contribute to federal habeas as being a "source of friction between

state and federal courts" which "Congress obviously meant to [partially] alleviate when it enacted subsection (d)" of section 2254. *Summer v. Mata*, 449 U.S. at 550. If the intent of Congress is not to be frustrated and section 2254(d) is to be given any force, this Court must grant review of the court of appeals' decision.

CONCLUSION

Based upon the foregoing, petitioner urges the granting of this petition for a writ of *certiorari*. The court of appeals chose to follow its own precedent which it admitted was severely undercut by this Court's opinion in *Wheat* and is in conflict with other federal courts. Further, the Third Circuit ruled that there is a right to *pro hac vice* counsel encompassed within a state criminal defendant's Sixth Amendment right to counsel of choice, an issue decided to the contrary by other federal courts and the state courts of New Jersey and never decided by this Court.

Review by this Court is warranted to clarify the law on whether a right to have counsel admitted *pro hac vice* is contemplated within a defendant's right to counsel of choice and to determine whether an alleged violation of this right, if it exists, is subject to a harmless error analysis when reviewed in a *habeas* proceeding.

Respectfully submitted,

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Of Counsel and on the Petition

DATED: June 1989

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5456

GLEN FULLER,
Appellee

v.

WARREN DIESSLIN,
Superintendent of Buena Vista Correctional Facility,
Buena Vista, Colorado and W. CARY EDWARDS,
Attorney General for State of New Jersey,

Appellants

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civ. No. 87-2353)

Argued October 31, 1988

Before: GIBBONS, BECKER and WEIS,
Circuit Judges

(Filed February 24, 1989)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This is an appeal from an order of the district court granting a writ of habeas corpus to a state prisoner on the grounds that he was arbitrarily denied the right to counsel of his choice by a New Jersey state court before which he appeared on drug and weapons charges. Petitioner, Glen Fuller, had New Jersey counsel, who moved for admission *pro hac vice* of two out-of-state lawyers who were prepared to try Fuller's case. Without a hearing or making particularized findings, the state trial court denied Fuller's request, reasoning that local counsel was competent and that unacceptable trial delay was likely with two out-of-state counsel. Upon pleading guilty, Fuller reserved the right to raise the counsel of choice issue on appeal. Appellate relief in the state court was denied, thereby exhausting state remedies and setting the stage for the habeas petition.

New Jersey appeals the district court's decision granting the writ. The appeal raises the question whether a trial court, which presumes that the proceedings will be unacceptably delayed where the defendant is represented by out-of-state counsel, and denies counsel of choice on that basis alone (assuming the existence of competent local counsel), has arbitrarily denied the right to counsel of choice and therefore violated defendant's sixth amendment right to counsel. Although New Jersey argues strongly, *see infra* Typescript at 12-13, that our precedents in *United States v. Romano*, 849 F.2d 812 (3d Cir. 1988) and *United States v. Rankin*, 779 F.2d 956 (3d Cir. 1986), should be reevaluated in light of the Supreme Court's recent decision in *Wheat v. United States*, 108 S. Ct. 1692 (1988), we do not believe that that case may be read as overruling these cases, which control the question, and hence we will affirm.[1]

II. FACTS AND PROCEDURAL HISTORY

On November 14, 1980, Glen Fuller was a passenger in a car driven by Douglas Chappee, which was stopped for speeding in New Jersey. A search of the car turned up a large quantity of cocaine and about a pound of marijuana. Fuller and Chappee were subsequently indicted by a grand jury on three counts of possession of a controlled dangerous substance and one count each of possession of a controlled dangerous substance with intent to distribute and unlawful possession of a weapon. On motion to the New Jersey Superior Court (the trial court), Fuller requested,

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1. We note that *Romano* was decided shortly after the decision in *Wheat* was announced, but that *Wheat* was not expressly addressed in *Romano*. We presume, however, that the panel in *Romano* considered *Wheat*, but rejected the possibility that it overruled the *Rankin* line of cases followed in *Romano*.

through local counsel, that he be represented *pro hac vice* by a lawyer from Illinois and another from the District of Columbia. The trial judge based his denial of Fuller's motion on his belief that local counsel was competent, that the case was going to be hotly contested, and that two out-of-state counsel would severely inconvenience the proceedings, stating that "the nature of the probable delay . . . [that] will occur as a result of this matter . . . is so grave as to overcome the 'unfettered' right of defendant to counsel of his own choosing, and accordingly, the motion to admit pro hac is denied."[2] JA at 791-92.

Fuller subsequently requested leave to appeal the trial court's denial of his motion for counsel *pro hac vice* to the Appellate Division of the Superior Court, and to the Supreme Court of New Jersey, but leave was denied in both instances. Fuller then sought relief in the district court for the District of New Jersey, requesting a temporary restraining order, a preliminary injunction, and a permanent injunction. At that time the court denied relief and abstained in the face of the ongoing state criminal proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). An immediate appeal to this Court was withdrawn, and the trial court proceedings resumed.

In August of 1982, a suppression hearing was held before the state trial court. Two years later, on April 10, 1984, Fuller and codefendant Chappee entered conditional retraxit guilty pleas to possession of cocaine with intent to distribute, in exchange for

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2. At the time of the trial judge's determination, the state rule controlling admission of *pro hac vice* counsel stated that such counsel could be admitted "at the discretion of the court." N.J. Ct. R. 1:21-2 (1981). The rule has been subsequently amended; the district court inadvertently referred to the amended version. Dist. Ct. Op. at 9.

dismissal of the remaining counts and the state's agreement to make no recommendation as to sentence other than that incarceration was necessary. Fuller reserved the right to raise certain legal issues, including the counsel of choice issue, for purposes of appeal. He was sentenced to a term of 20 years in jail and a fine of $20,000.

Fuller appealed to the Appellate Division, which affirmed Fuller's conviction, holding *inter alia* that the trial court had not abused its discretion in denying Fuller's motion for admission of counsel *pro hac vice* and further stating that Fuller had "received extremely competent representation both in the trial court and here." *State v. Chappee*, 211 N.J. Super. 321, 335, 511 A.2d 1197, 1205 (App. Div. 1986). The New Jersey Supreme Court denied certification. *State v. Fuller*, 107 N.J. 45, 526 A.2d 136 (1986).

On June 16, 1987, Fuller filed his habeas petition. 28 U.S.C. § 2254 (1982). On May 10, 1988, the district court filed an amended opinion and order, granting the writ. The court ruled that: (1) the denial of Fuller's request for counsel *pro hac vice* deprived Fuller of his right to counsel of choice because the existence of local capable counsel "is not a sufficient reason to overcome [the defendant's] right to counsel of choice"; and (2) that the trial court had erred in making a "rote application" of a "blanket generalization" rather than an individual determination of potential delay based on the facts of this case. Dist. Ct. Op. at 14-15. The court went on to note that the trial court's distinction between in-state and out-of-state attorneys was a "geographical" distinction that made little sense in light of the "reality of a highly mobile bar that has at its disposal modern transportation and communication." *Id.* at 16. The court held that deprivation of the right to counsel of choice is *per se* reversible and does not

require a showing of prejudice, citing *United States v. Laura*, 607 F.2d 52, 58 (3d Cir. 1979), and *United States v. Rankin*, 779 F.2d 956, 960 (3d Cir. 1986).

Our review of this legal determination of the district court is plenary. *See United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir. 1985); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981).

III. DISCUSSION

A. *Does the Right to Counsel of Choice Include a Right to Counsel Pro Hac Vice?*

New Jersey challenges the district court's issuance of the writ on the ground that if there is a right to choose out-of-state counsel, that right is not absolute and, at all events, was not improperly denied in this case. At the threshold, we must determine whether the right to counsel of choice encompasses the right to counsel *pro hac vice*. Neither this Court nor the Supreme Court has explicitly determined whether the right to counsel *pro hac vice* is included within the right to counsel of choice. The Supreme Court has considered whether an out-of-state attorney has a fourteenth amendment due process right to practice in a state in which he is not a member of the bar and held that there is no such right. *See Leis v. Flynt*, 439 U.S. 438 (1979). The Court, however, made it clear that it had not addressed the issue of whether a *litigant's* right to counsel of choice includes the right to out-of-state counsel. *Leis*, 439 U.S. at 442 n.4.

New Jersey advances no argument why, and we see no reason why, a request for counsel *pro hac vice* should be treated any differently by a trial court than any other request for counsel of choice.[3] We do have, as

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3. Because Fuller does not challenge the state's *pro hac vice* rule itself, but only the trial court's weighing of his right to counsel

the district court noted, "a highly mobile bar that has at its disposal modern transportation and communication." Dist. Ct. Op. at 16. Therefore, the number of occasions on which a defendant will desire to be represented by counsel *pro hac vice* is frequent and will be increasingly so. Arbitrarily to deny a defendant the right to obtain counsel from outside the state would untowardly limit the possible choices the defendant might have. Thus, we conclude that the right to counsel *pro hac vice* is encompassed analytically within the right to counsel of choice, and as such should be examined within the analytic framework generally employed in right to counsel of choice cases.

B. *Does Arbitrary Denial of Counsel of Choice Require Per Se Reversal?*

The sixth amendment guarantees a criminal defendant the right "to have the Assistance of Counsel for his defense." U.S. Const., amend. VI. It is well-settled that a component of this right is the

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of choice against the requirements of fair and proper judicial administration, we are not faced with the issue of whether the rule itself is unconstitutional.

New Jersey argues that there is no sixth amendment right to *pro hac vice* counsel, asserting that the state has an "important interest in maintaining control over those persons practicing law within their borders" and that if the right to counsel *pro hac vice* is constitutionalized, then the "state courts [would be] ... required to admit them." Appellant's Br. at 15. New Jersey's conclusion overstates the issue. The right to counsel of choice has been traditionally "balanced against the requirements of the fair and proper administration of justice." *Rankin*, 779 F.2d at 958. Therefore, the mere fact that a defendant's sixth amendment right to counsel of choice encompasses the right to request counsel *pro hac vice* does not necessarily require the courts to approve the request in every instance. Rather, it creates a presumption that the defendant's request should be granted unless considerations of judicial administration supervene.

protection of a defendant's opportunity to obtain counsel of choice. *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *Romano*, 849 F.2d at 818; *Rankin*, 779 F.2d at 958; *Laura*, 607 F.2d at 55-56. The sixth amendment does not, however, "ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat*, 108 S. Ct. at 1697; *see also Romano*, 849 F.2d at 819 ("The right to choose counsel is not unqualified ... ."); *Rankin*, 779 F.2d at 958 ("Although the right to representation by chosen counsel is subject to limitations it may not be hindered unnecessarily."); *Laura*, 607 F.2d at 57 (no absolute right to counsel of choice). Thus, while a defendant's choice may not be arbitrarily denied, a defendant's right to choose his own counsel must be balanced against the fair and proper administration of justice. *Rankin*, 779 F.2d at 958; *Laura*, 607 F.2d at 57; *see also Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) ("a trial court, acting in the name of calendar control, cannot arbitrarily and unreasonably interfere with a client's right" to counsel of choice).

Our recent decision in *United States v. Romano*, 849 F.2d 812 (3d Cir. 1988), controls the outcome of this case. In *Romano*, following the district court's revocation of defendant's pro se status, the defendant requested counsel of her choice. The court summarily denied defendant's request, instead appointing counsel for her. *Romano*, 849 F.2d at 818. On appeal, this Court held that the district court's failure to conduct a hearing and failure to make "specific findings of fact consistent with the evidence" as to the suitability of defendant's chosen counsel violated the defendant's sixth amendment rights and required reversal. *Id.* at 820. The holding of *Romano*, therefore, is that a trial court's arbitrary denial of defendant's request for her counsel of choice requires per se

reversal. *See also Rankin*, 779 F.2d at 960 (arbitrary denial of defendant's request for counsel of choice requires reversal without showing of prejudice); *Laura*, 607 F.2d at 57-58 (same); *United States v. Panzardi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987) (mechanistic application of local rule that permits district judge to arbitrarily deny defendant's request for counsel of choice requires reversal).

New Jersey has offered the following not insubstantial arguments for a conclusion that *Romano* should not control the outcome of this case, but rather the right to counsel of choice should be governed by the harmless error beyond a reasonable doubt standard. First, in the Supreme Court's most recent case involving waiver of conflict-free counsel, the Court implies that the right to counsel of choice is grounded in the right to effective assistance of counsel. In *Wheat*, 108 S. Ct. at 1697 (upholding district court's decision not to permit waiver of right to conflict-free counsel), the Court stated that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Because the Court did not find error in the district court's order, it does not address in any fashion whether a prejudice, harmless error, *Chapman v. California*, 386 U.S. 18 (1967), or per se analysis would have been appropriate had they found error. The Court, however, states that the "essential aim" of the Sixth Amendment is the effective assistance of counsel. While that does not answer the question of which standard applies it would not, as New Jersey pointed out at oral argument, make much sense to require per se reversibility in

counsel of choice cases if the right to counsel of choice is intended to secure the right to effective assistance of counsel and the right to effective assistance of counsel requires a showing of prejudice for reversal. *See Strickland v. Washington*, 466 U.S. 668, 691-92 (1984).

Second, New Jersey argues that the right to counsel of choice is, in any case, akin to the right to effective assistance of counsel and, therefore, a harmless error or prejudice analysis should be applied. Under existing jurisprudence, it is not clear whether the right to counsel of choice is more akin to the right to effective assistance of counsel or the right to self-representation. A denial of the right to self-representation is per se reversible. *See Faretta v. California*, 422 U.S. 806 (1975). But a denial of the right to effective assistance of counsel is subject to a prejudice analysis. This Court in *Rankin*, 779 F.2d at 960, stated that the right to counsel of choice is a species of the right to self-representation. Arguably, therefore, per se analysis should apply. *See also Laura*, 607 F.2d at 58. But, as New Jersey points out, the Supreme Court in *Wheat* states that the right to counsel of choice is not a species of the right to self-representation and therefore implies that per se analysis would not necessarily apply. *Wheat*, 108 S. Ct. at 1697 n.3 (a defendant's "right to represent *himself* if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel").

Were we writing on a clean slate, we would be presented with the difficult issue of determining whether the right to counsel of choice is governed by a harmless error, or prejudice, analysis or a per se reversal analysis. Prior to *Strickland*, in which the Supreme Court announced a prejudice test for ineffective assistance of counsel cases, courts could

safely assume that all right to counsel cases were governed by the per se reversibility standard. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that denial of right to counsel is governed by per se standard). In fact, in this Circuit, the seminal right to counsel of choice case simply assumed that a per se reversal analysis applied. *See Laura*, 607 F.2d at 58. The subsequent Third Circuit right to counsel of choice cases have relied heavily on *Laura* without addressing whether the intervening *Strickland* case altered the standard for reversal. *See United States v. Romano*, 849 F.2d 812 (3d Cir. 1988); *United States v. Rankin*, 779 F.2d 956 (3d Cir. 1986). It is by no means clear, however, whether *Laura* survives *Strickland* or the burgeoning constitutional harmless error cases. *See generally* T. Stacy & K. Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79 (1988) (detailing increasing trend toward harmless error analysis and providing analytical approach).[4]

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4. It is also unclear exactly what the law in this Circuit is with respect to the standard in right to counsel of choice cases that do not involve arbitrary denials. Although the issue has been addressed in dicta, no Third Circuit case has yet expressed a holding as to whether a nonarbitrary, but erroneous denial of the right to counsel of choice is subject to either a harmless error analysis or falls under a rule of per se reversibility. For instance, a trial court could make a reasoned determination on the basis of a fully prepared record (hence a non-arbitrary determination), but still err in concluding that counsel of choice should be denied. Arguably, the discussion in *United States v. Flanagan*, 679 F.2d 1072, 1075 (3d Cir. 1982), *vacated on other grounds*, 465 U.S. 259 (1984), implies that absent arbitrary action, there can be no reversal, basing its conclusion on *Davis v. Stamler*, 650 F.2d 477 (3d Cir. 1981), but the court in *Davis* not only applied an arbitrariness standard, but also a reasonableness standard to the trial judge's activities. We therefore conclude that no case in this Circuit has yet expressed a holding as to the standard to be applied in nonarbitrary, erroneous denials of the right to counsel.

Despite New Jersey's interesting arguments to the contrary, *Wheat's dicta*, however pregnant, cannot control the outcome. Rather, we are constrained by this Circuit's approach in *Rankin* and *Romano*. In this Circuit, absent further (and more concrete) Supreme Court developments or an in banc opinion, where there is an arbitrary denial of the right to counsel of choice, reversal is per se.

The district court in this case measured the trial court's treatment of Fuller's motion for counsel *pro hac vice* against the well-settled standards discussed *supra*, holding that the trial judge "fail[ed] to scrutinize the particular case at bar" and therefore violated Fuller's sixth amendment rights. As the following discussion of the trial court's inquiry will make clear, the district court's conclusion was correct.

C. *Was the State Trial Court's Denial of Counsel Pro Hac Vice Arbitrary?*

The state trial court determined that local counsel was capable of adequately representing Fuller. The court stated that it was "satisfied there's an adequate degree of expertise available in this state to handle any of these motions." Dist. Ct. Op. at 11 (quoting trial court transcript of July 9, 1981, at 32). The district court rejected the state courts' determination, reasoning that local counsel were not necessarily more knowledgeable about local law than out-of-state counsel and that the state rule's requirement that out-of-state counsel appear with local counsel would mitigate any delays potentially caused by an out-of-state counsel's lack of knowledge of the local law. We agree with the district court that, as a logical matter, it is not necessarily true that local counsel will be more knowledgeable about the New Jersey law than out-of-state counsel and therefore the competence of

in-state counsel will not in itself reduce the likelihood of delay.

On appeal, however, New Jersey has characterized this issue not so much as a factual matter of whether in-state counsel would know more than out-of-state counsel, but rather, as a proposed legal standard: if there is adequate local counsel, then a denial of a request for out-of-state counsel cannot deny a defendant his sixth amendment rights. We conclude that this approach is without merit, because it collapses the right to counsel of choice into the right to effective assistance of counsel. A fair restatement of New Jersey's position is that if the local pool of available counsel would supply effective assistance, then the denial of the right to counsel of choice could not rise to a constitutional deprivation.[5] In New Jersey's favor, the Supreme Court has stated that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat*, 108 S. Ct. at 1697. Yet, even if the right to counsel of choice exists for the purpose of securing effective assistance of counsel to the defendant, as New Jersey suggests, *see supra* Typescript at 10, the two rights are not identical. We do not understand the language in *Wheat* to mean that the right to counsel of choice is

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5. One Circuit has held that an indigent defendant has no right to have out-of-state counsel appointed for him, because of the state's "legitimate interest in developing a pool of competent attorneys to represent indigents ...." *Bedrosian v. Mintz*, 518 F.2d 396, 401 (2d Cir. 1975). That case does not speak, however, to a case such as the one before us wherein there is no claim of a countervailing state interest for preferring in-state counsel over out-of-state counsel. It therefore provides no guidance for our decision in this case.

important *only* insofar as it secures the right to effective assistance of counsel. Rather, it could be fairly interpreted to mean that, although the core value in the sixth amendment is effective assistance of counsel, the amendment also comprehends other related rights, such as the "right to select and be represented by one's preferred attorney." *Id.*

This Court has clearly stated the importance of a defendant's securing the counsel of his choice, and these considerations are significantly different from the goals sought from effective assistance of counsel:

> [T]he most important decision a defendant makes in shaping his defense is his selection of an attorney. The selected attorney is the mechanism through which the defendant will learn of the options which are available to him. It is from his attorney that he will learn of the particulars of the indictment brought against him, of the infirmities of the government's case and of the range of alternative approaches to oppose or even cooperate with the government's efforts.
>
> ....
>
> Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense. It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment.

Laura, 607 F.2d at 56. Therefore, it should not be enough for the government to demonstrate availability of other competent counsel to defeat the defendant's request for particular counsel. Rather, the only concerns the court may consider in weighing whether to grant the defendant's request for counsel of choice are the defendant's right to counsel of choice and the fair and proper administration of justice.

The state trial court also expounded on the difficulties inherent in cases involving out-of-state attorneys and caused by the likely delays incumbent upon traveling and the trial court's inability to negotiate trial scheduling with out-of-state judges. *See* Dist. Ct. Op. at 12-13. The district court rejected the trial court's conclusion, stating that "[t]he rote application of this kind of blanket generalization 'leaves no room for the exercise of discretion.' Rather, it represents the court's failure to scrutinize the particular case at bar." *Id.* at 15 (quoting *Panzardi Alvarez*, 816 F.2d at 817). The district court further declared that the record demonstrated that local counsel was unprepared to proceed, but that out-of-state counsel was prepared and concluded that "the trial court's view was based, at best, upon speculative delays rather than upon a record which could support a finding that the particular out-of-state attorneys repeatedly impeded the progress of litigation." Dist. Ct. Op. at 15-16.

We hold that the district court correctly concluded that the trial court's wooden approach and its failure to make record-supported findings balancing the right to counsel with the demands of the administration of justice resulted in an arbitrary denial of Fuller's motion for counsel *pro hac vice*. We are satisfied that the district court correctly applied the law of this Circuit in concluding that such an arbitrary denial constituted a

per se constitutional error justifying issuance of the writ.[6] *See Romano*, 849 F.2d at 820.[7]

We hasten to add that we do not hold that a court is prohibited from using its "instinct and judgment based on experience," *Wheat*, 108 S.Ct. at 1699, when it weighs the competing rights of the litigant to counsel of his choice and wise judicial administration. Rather, we merely hold that the court may not assume that out-of-state attorneys will not be capable of meeting the

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6. New Jersey argues that we must reverse the district court, because 28 U.S.C. § 2254(d) (1982) requires us to give great deference to a state court's factfindings. However, the trial court in this case made no findings of fact with respect to the issue of counsel of choice. Rather, its conclusions were drawn from its presuppositions about the impact of out-of-state counsel on trial court scheduling. Where the district court has made no findings of "historical fact," we need not presume its statements are correct. *see Holland v. Attorney General of New Jersey*, 777 F.2d 150, 155 (3d Cir. 1985), and therefore § 2254(d) provides no impediment to our affirmance of the district court's issuance of the writ.

7. The state trial court also perceived that the case was going to be "fought tooth and nail," would involve a number of interlocutory appeals, and therefore that scheduling would be even more difficult. J.A. 786-87. While the district court did not address this issue in terms, we find this justification for the denial of the motion for counsel of choice most disturbing. We agree with the state trial court that it is undeniable that a hotly contested case is likely to intensify scheduling demands upon the court, but the defendant's interest in counsel of choice in such a situation is most acute and should not be denied absent record evidence that the chosen counsel would in fact delay the scheduling of the proceedings. It would make no sense to condition the grant of a request for counsel of choice on the degree of intensity with which the defendant pursues his case or whether the government and the defendant happen to be amicable or at loggerheads. Moreover, the arbitrariness of the trial court's conclusion is heightened by the fact that Fuller did not engage in a great number of interlocutory appeals, but rather pled guilty. This point, therefore, buttresses our holding that the district court properly issued the writ.

court's schedule. Upon obtaining sufficient information as to the availability of the requested counsel, the court must then employ its knowledge and experience to determine whether the litigant's choice of counsel will unduly frustrate the administration of the court. It is this kind of reasoned balancing that is necessary to avoid the arbitrariness problem.

Moreover, these holdings do not militate against the principle that a trial court has broad discretion in the administration of its trials. In *Wheat*, the Court stated that "the District Court must be allowed substantial latitude in refusing waivers of conflicts of interest .... In the circumstances of this case, with the motion for substitution of counsel made so close to the time of trial, the District Court relied on instinct and judgment based on experience in making its decision." 108 S. Ct. at 1699. And in *Morris v. Slappy*, 461 U.S. 1, 11 (1983) (right to counsel of choice not violated where trial court refused continuance even though defendant's counsel of choice was in the hospital), the Court emphasized that "[t]rial judges necessarily require a great deal of latitude in scheduling trials." *See also Rankin*, 779 F.2d at 960; *Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 613 (4th Cir. 1986) (courts have broad latitude in deciding whether to grant continuance, even where decision results in denial of counsel of choice), *cert. denied*, 478 U.S. 1008 (1986).

The Eighth Circuit has gone further and interpreted this broad grant of discretion to permit a trial court to deny the defendant's choice based on the trial court's presumption that in-state counsel would provide for a more "orderly processing of the case" than defendant's requested out-of-state counsel. *Williams v. Nix*, 751 F.2d 956, 959 (8th Cir. 1985), *cert. denied*, 471 U.S. 1138 (1985). We do not believe that a

requirement that the trial court determine whether the defendant's chosen counsel is likely in fact to delay the trial improperly impinges on its generally broad discretion over scheduling and administration of its caseload and therefore decline to follow the more expansive Eighth Circuit position that would permit a trial court to presume delay if out-of-state counsel is entered.

IV. CONCLUSION

In sum, the state trial court's reasoning underlying its denial of Fuller's motion for counsel of choice was fundamentally flawed, because it was not based on the facts of this particular case or on considerations that are necessarily related to the determination whether to deny the defendant's right to counsel of choice. We hold that Fuller's request for counsel of choice was arbitrarily denied, that Fuller's sixth amendment right to counsel of choice was thereby violated, and therefore that the district court was correct in issuing the writ of habeas corpus. That order of the district court will therefore be affirmed.

WEIS, *Circuit Judge, dissenting.*

The majority concludes that the state trial judge arbitrarily denied the defendant's request for representation by counsel of his choice. I disagree with that assessment of the state court's ruling, and would reverse the district court's grant of habeas corpus. Because I find the trial judge acted within the scope of his discretion, I would delay until another day the constitutional question prematurely resolved by the majority in this case.

Defendant Glen Fuller was asleep in the rear seat of a car driven by his codefendant, Douglas Chappee, when they were pulled over by New Jersey state troopers for speeding at 4:30 a.m. on November 14, 1980. The troopers smelled marijuana smoke and noticed a burnt marijuana cigarette on the floor of the automobile. They requested and received permission to examine the trunk where they discovered more than five pounds of cocaine and lesser quantities of other drugs. Both Fuller and Chappee were indicted, and their cases were consolidated for pretrial motions and trial.

On July 2, 1981, local counsel for codefendant Chappee moved the admission *pro hac vice* of John Van Ness, an attorney from Aspen, Colorado. The judge to whom the case had been assigned for trial denied the motion, observing that it was "difficult enough to run a trial calendar and a motion calender with counsel throughout the State, to get them here together on time, obviously if we involved out-of-state counsel from Colorado, who is on his feet today in Colorado and perhaps tomorrow in California, and the day after that in Florida, the opportunity to consult, meet with, and to schedule becomes extremely difficult."

The trial judge commented further that the case did not appear to involve unusual difficulty requiring

out-of-state counsel, but instead presented issues with which local lawyers were quite familiar. He determined that the Colorado attorney's proposed admission *pro hac vice* would "unnecessarily burden and unduly delay the disposition of motions, arguments and trial[] of the case." Responding to a question from local counsel, the judge elaborated on the difficulties of airline scheduling, noting that no special expertise is required "to understand it's harder to get a hold of a guy from Colorado, than it is from New Jersey."

A week later the judge denied a similar motion to admit Keith Stroup of Washington, D.C. and Michael Pritzker of Illinois on behalf of defendant Fuller. The court explained,

> "one [lawyer] from Aspen, Colorado, one from either D.C. or Illinois, or wherever, plus local counsel, plus out-of-state defendants. There are too many unknowns in that equation. It's going to be difficult just with the out-of-state clients and in-state attorneys to run anything like a reasonable motion and Appellate schedule, which occur in this case, without adding two lawyers from two different states, who have multiciplicity of obligations and to run it all at the same time."

The judge's concern with the defendants' availability arose from the fact that both were nonresidents -- Fuller lived in Colorado, Chappee in Massachusetts -- and both were enlarged on bail.

The court recognized that the state's policy did not discourage *pro hac vice* admissions, but that it first required a balancing of the pertinent circumstances. The judge recounted the imminent air controllers' strike and noted the heavy scheduling obligations imposed by the speedy trial rules. He pointed out that even if all the motions pending in the case were immediately resolved, the earliest trial date would fall

in November or December, four or five months away. More realistically, if disposition of the motions was delayed until August and if out-of-state counsel were to be admitted, "we're talking earliest disposition . . . next spring, when the case is a year old and probably longer."

This factual background, considered in light of the judge's actual comments, is essential to a proper resolution of the legal issue presented here. The constitutional dimension of the right to retain counsel of one's choice, though consistently recognized, has been coupled with the qualification that it is not absolute. *United States v. Flanagan*, 679 F.2d 1072, 1075 (3d Cir. 1982), *rev'd on other grounds*, 465 U.S. 259 (1984); *Davis v. Stamler*, 650 F.2d 477, 479 (3d Cir. 1981). We have acknowledged that, as desirable as it may be for a criminal defendant to select an attorney of his own choosing, "that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice." *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214 (3d Cir. 1969), *cert. denied*, 397 U.S. 46 (1970).

The complexities of calendar control in metropolitan courts, the necessary balancing of the accuseds' rights to a speedy trial, the prosecutors' need for stability in scheduling, and the availability of witnesses are all factors in the calculus. Unrestrained liberality can upset the delicate balance; accommodating one defendant in scheduling might prejudice the rights of another whose trial would be accelerated or delayed. Thus, the "inescapable" conclusion, we have determined, is that "although the right to counsel is absolute, there is no absolute right to a particular counsel." *Id.* at 1215. *See Wheat v. United States*, ___ U.S. ___, 108 S. Ct. 1692, 1697 (1988).

A proper concern for the difficulties of calendar control was critical to our decision in *United States v. Rankin*, 779 F.2d 956 (3d Cir. 1986). There, we decided that the district court infringed on the defendant's right to counsel of choice by refusing to continue a trial despite the fact that the defendant's lawyer was still engaged in state court. The pivotal element in that case was the inconsistency we perceived between the district court's action and a compact that had been reached by the local federal and state courts designed to ease inter-forum calendar conflicts.

In those circumstances, the public's interest in efficient administration of the criminal justice system coincided with the defendant's request for a continuance. Consequently, the defendant's choice of counsel -- which otherwise might have been subordinated to the need to proceed expeditiously to trial -- was given deference. The ruling in *Rankin* did not compromise our previous holdings that the right to counsel of choice is not absolute.

The Supreme Court has emphasized that trial judges must be given wide latitude in scheduling trials. "Not the least of [the judge's] problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *Morris v. Slappy*, 461 U.S. 1, 11 (1983). This consideration is particularly pertinent in today's bustling metropolitan court systems where calendering is a frustrating, complicated process that constantly threatens the prompt, orderly disposition of criminal cases.

My review of the record here does not bear out the district court's conclusion that the state trial judge proceeded from a per se theory that out-of-state attorneys hinder the efficient processing of a case. To

the contrary, the trial judge's comments revealed that his concern was not with out-of-state counsel as such, but with this particular congery of attorneys, commuting from such distant areas as Colorado and Illinois. The trial judge's conclusion that out-of-state counsel's availability -- together with that of the Colorado and Massachusetts defendants -- threatened to produce logistical problems was neither arbitrary nor unpredictable.

The district court's reliance on the speed of modern transportation to overcome geographical considerations is undermined by the realities of the jetage: flight cancellations, lost litigation boxes, weather delays, and, as the trial judge noted at the time, the imminence of an air controller's strike. Although air travel is quick when conditions are right, experienced travelers know that expectations of flight availability and on-time arrivals are often more fanciful than real. Moreover, the district court did not evaluate the added complexities in this litigation brought on by the consolidation of the Fuller and Chappee cases. Thus, not only were the *pro hac vice* applications of attorneys Stroup and Pritzker at issue, but that of Mr. Van Ness as well.

As one reason for granting habeas corpus relief, the district court construed the state judge's ruling as applying a per se presumption that New Jersey lawyers were more knowledgeable about state and local rules than the counsel defendants selected. I find nothing in the trial judge's discussion that expresses such a view. In fact, the judge generously acknowledged the competence of out-of-state counsel, at times even intimating that the special talents of chosen counsel exceeded those necessary for the issues presented.

A fair reading of the state court transcript persuades me that the district court mischaracterized the trial judge's ruling as resting on per se factors. To the contrary, I find that the state judge sufficiently

explained the specific circumstances that counseled against admitting the three attorneys *pro hac vice*.

Judges in busy criminal courts encounter daunting impediments to the prompt disposition of the many cases awaiting trial. The difficulties to beginning a trial on its scheduled day are many and diverse, and it is hardly surprising that an overwhelmed court can rarely accord parties a date certain. Reducing the number of factors that complicate scheduling while nevertheless honoring the rights of the affected parties is no easy task. Inevitably, some accommodation must at times be reached, and harried trial judges must be given wide discretion in this frustrating endeavor.

The state trial judge here did not abuse his discretion in denying defendant representation by out-of-state counsel. I would reverse the judgment of the district court and vacate the grant of the writ of habeas corpus.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-5456

GLEN FULLER

vs.

WARREN DIESSLIN, Superintendent of Buena Vista Correctional Facility, Buena Vista, Colorado and W. CARY EDWARDS, Attorney General for State of New Jersey

W. Cary Edwards, Attorney General of New Jersey and Warren Disslin, Superintendent of the Buena Vista Correctional Facility in Colorado,

Appellants

(D. C. Civil No. 87-2353)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE - - - - DISTRICT OF NEW JERSEY

Present: GIBBONS, *Chief Judge*, BECKER AND WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the- - - - District of New Jersey and was argued by counsel October 31, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered May 13, 1988, be, and the same is

hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

February 24, 1989

Certified as a true copy and issued in lieu
of a formal mandate on April 3, 1989.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-5456

GLEN FULLER,

Appellee

v.

WARREN DIESSLIN, Superintendent of Buena Vista Correctional Facility, Buena Vista, Colorado and PETER N. PERRETTI, JR., Attorney General for the State of New Jersey

Appellants

(D.C. Civil No. 87-2353)

SUR PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges* and WEIS, *Senior Circuit Judge**

The petition for rehearing filed by Appellants, Warren Diesslin and Peter N. Perretti, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having

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*As to panel hearing only.

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: MAR 24 1989

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Received
William T. Walsh, Clerk
May 10 233 PM '88
United States
District Court

Civil Action No. 87-2353

GLEN FULLER,

Petitioner.

v.

WARDEN DIESSLIN, Superintendent of the Buena Vista Correctional Facility, Buena Vista, Colorado, and W. CARY EDWARDS, Attorney General of the State of New Jersey,

Respondents.

AMENDED OPINION

ACKERMAN, District Judge

INTRODUCTION

Petitioner, Glen Fuller, brings this petition for habeas corpus relief under 28 U.S.C. § 2254. Petitioner is currently confined at the Buena Vista Correctional Facility in Colorado, but as a result of a separate conviction in

the New Jersey courts, the State of New Jersey has lodged a detainer with the State of Colorado which requires that petitioner be surrendered to New Jersey upon completion of his sentence in Colorado. Petitioner presently requests an order directing his release from any future custody by the Attorney General for the State of New Jersey on the ground that his sixth amendment right to counsel of choice was violated because the state trial judge denied his request for the *pro hac vice* admission of two-out-of state attorneys.

On February 11, 1988, I filed an opinion and order in which I granted petitioner's request for a writ of habeas corpus. On March 4, 1988, it was brought to my attention that the issue of *pro hac* admission of petitioner's counsel of choice had been raised before the Honorable Anne Thompson of the United States District Court for the District of New Jersey. *See Pritzker v. Hamlin*, No. 81-2245, slip op. (D.N.J. filed July 16, 1981) (unpublished). I was unaware of this prior federal proceeding when I decided to grant the writ. Thus, as a result of this information, I vacated the writ and ordered the parties to brief the issue regarding the effect, if any, the prior federal proceeding has on my decision to grant the writ. It should be noted that I vacated the writ without any knowledge that my decision had been appealed. Notice of this Appeal was conveyed to me after I entered the order in which I vacated the writ. The appeal itself has since been withdrawn.

Upon review of the proceeding before Judge Thompson and in consideration of the arguments submitted on the effect of her decision on my own, it appears that counsel sought to stay the criminal proceeding on the ground that prosecution of that case without counsel of choice would violate the constitution. Judge Thompson denied the request for a stay on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). In that case, the Supreme Court made clear that a federal court lacked authority to stay a crim-

inal proceedings, absent extraordinary circumstances. Judge Thompson found such circumstances to be lacking and thus abstained from interfering with the ongoing state criminal proceeding.

I agree with counsel that Judge Thompson's decision rested on the abstention doctrine and that she did not rule on the merits of the *pro hac vice* issue. Therefore, I find it has no bearing on my prior decision. I now turn to the merits of the case.

PROCEDURAL HISTORY

On February 27, 1987, petitioner was indicted in Middlesex County for possession of a controlled dangerous substance, possession of such a substance with an intent to distribute, and unlawful possession of a weapon.

In May of 1981, petitioner filed a motion, pursuant to N.J. Rules of Court 1:21-2, for the *pro hac vice* admission of Keith Stroup, a member of the bar of the District of Columbia, and Michael Pritzker, a member of the bar of the state of Illinois. On July 9, 1981, the trial judge sitting in the Superior Court, Law Division, Middlesex County, denied petitioner's request for admission of the attorneys based upon a consideration of the degree of difficulty and novelty of the issues presented in this case, the expertise needed to adequately defend the accused and the demand for stability in managing the court's docket as a whole and this case in particular. The trial judge specifically stated that while he was satisfied that these out-of-state attorneys are in good standing in the states in which they are admitted to practice law and are experienced criminal lawyers, the difficulty in coordinating the schedules of two attorneys from different states with the schedules of the court, prosecution, and defendants, would result in numerous delays, sufficient to overcome petitioner's sixth amendment interests in counsel of choice. (Trans. of July 9, 1981 at 39). The court further stated that since these

attorneys regularly appeared in courts outside this state, the judge could not easily contact judges outside this jurisdiction to coordinate conflicting court obligations. (*Id.* at 38). Finally, the court asserted that potential travel delays further exacerbated the likelihood of adjournments. (*Id.* at 34). In short, the judge held that management of his calendar and the avoidance of trial delays required that he deny petitioner's request for the *pro hac vice* admission of Mr. Stroup and Mr. Pritzker.[1]

Thereafter, petitioner, among others, brought an action in federal court to obtain a temporary restraining order to stay the state criminal proceeding. On July 16, 1981, Judge Thompson issued her opinion in which she denied the requested relief. The parties appealed this decision to the Third Circuit. The appeal was withdrawn on September 25, 1981.

Thereafter, numerous pretrial suppression and evidentiary hearings followed. Almost three years lapsed, however, before petitioner pled guilty to possesion with an intent to distribute freebase cocaine. As part of this plea, which was entered on April 10, 1984, petitioner reserved his right to appeal, *inter alia*, the denial of his *pro hac vice* motion which, he asserts, resulted in the unconstitutional denial of counsel of choice.

On June 19, 1986, the Appellate Division of the Superior Court considered the merits of his appeal on this issue held that the trial judge did not commit an error in his denial of petitioner's request for the admission of out-of-state counsel *pro hac vice* since there was a risk that the presence of out-of-state counsel might hinder the swift processing of the case. The Appellate Division was persuaded that the use of counsel from various geographic

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[1] On July 2, 1981, the court also denied a similar request of petitioner's co-defendant, Douglas Chappee, who sought the *pro hac vice* admission of a Colorado attorney. His request for leave to appeal this decision was denied by the Supreme Court of New Jersey on July 14, 1981.

locations would increase the difficulties involved in scheduling criminal matters. Moreover, the court noted that the case presented issues that could be ably handled by local counsel and the record revealed that petitioner received competent representation and thereby vindicated the trial judge's belief that New Jersey counsel could conduct a fine defense. For these reasons, the Appellate Division held that the trial judge did not abuse his discretion in denying petitioner's request.

On November 26, 1986, the Supreme Court of New Jersey denied petitioner's request for certification.

On June 16, 1987, petitioner filed the within petition for a writ of habeas corpus.

EXHAUSTION

A federal court will not consider an application for a writ of habeas corpus unless the petitioner has exhausted the remedies available in the courts of the state. 28 U.S.C. § 2254(b). Since the record in this case reveals that petitioner has exhausted his state remedies, the within petition is ripe for disposition.

DISCUSSION

The sixth amendment of the Constitution guarantees to any criminal defendant the right "to have the Assistance of Counsel for his defense." U.S. Const. amend VI. Inherent in this guarantee is the protection of and deference to the defendant's actual choice of counsel. *See United States v. Alvarez*, 816 F.2d 813, 816 (1st Cir. 1987); *United States v. Laura*, 607 F.2d 52, 55 (3d Cir. 1978). *See also Powell v. Alabama*, 287 U.S. 45, 53 (1932) in which the Supreme Court recognized that an essential component to the right to counsel is the opportunity to secure counsel of choice. It is beyond dispute that "the most important decision a defendant makes in shaping his defense is his

selection of his attorney." *Laura, supar*, 607 F.2d at 56. In addition to the strategic ramifications, interference with the exercise of this selection impedes the development of trust between an attorney and his client, "which is the cornerstone of the adversary system." *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981); *cert. denied*, 454 U.S. 1162 (1982). Thus, given the constitutional dimensions of this decision, the courts are prohibited from taking any arbitrary action that hinders the effective use of a particular counsel and similarly requires that the defendant's choice of counsel not be dealt with lightly or arbitrarily. *Laura, supra*, 607 F.2d at 57; *United States v. Ranken*, 779 F.2d 956, 958 (3d Cir. 1986); *United States v. Flanagan*, 679 F.2d 1072, 1076 (3d Cir. 1982), *rev'd on other grounds*, 465 U.S. 259 (1984); *United States ex rel Carey v. Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970). Accordingly, since a trial court's denial of a criminal defendant's request to retain out-of-state counsel implicates constitutional concerns, this decision must have been made based upon a proper exercise of discretion, which includes a recognition of the fundamental importance of the right to counsel of choice, though not absolute, and how the exercise of this right may be curbed in the interest of achieving the fair, efficient and orderly administration of justice. *Rankin, supra*, 779 F.2d at 958; *Davis v. Stamler*, 650 F.2d 477, 479 (3d Cir. 1981); *Laura, supra*, 409 F.2d at 1214.

In this circuit, the Court of Appeals has held that the sixth amendment right to counsel of choice must yield when, for example, an attorney's ethical conduct is questioned, *see Flanagan, supra*, or when, after a reasonable period, defendant has failed to select counsel of his own choice, and his continued failure to do so would result in further trial delays. *Rundle, supra*. In this latter instance, the legitimate concern with respect to facilitating the swift processing of criminal matters is clearly expressed as this interest presents itself within the context of cluttered crim-

inal dockets which are "constantly buffeted by conflicting forces." *Id.* at 1214. While the trial court must balance the conflicting demands of court administration with the rights of the accused," *id.*, this balance must be struck only after a close examination of the facts before the court. The non-discretionary application of a rule with respect to conditions which generally result in delays fails to comply with the requirement that the trial judge delicately balance sixth amendment concerns against the efficient and orderly administration of justice.

In weighing these interests, the trial judge must make sufficient, non-speculative findings with respect to how the defendant's choice of counsel may affect the case at hand, whether the selection demonstrates that it will result in delay or was made for dilatory or prejudicial purposes and if the choice will effect others awaiting trial, the availability of witnesses to testify and the concerns of the victim that justice is done. *See Morris v. Slappy*, 461 U.S. 1, 14 (1983); *Alvarez, supra*, 813 F.2d at 816.

In the case at bar, the exercise of petitioner's choice of counsel was embodied in his request for the *pro hac vice* admission of two attorneys licensed to practice law in the District of Columbia and Illinois, respectively. N.J. Court Rule 1:21-2 governs *pro hac vice* admissions. While the rule states that the *pro hac vice* admission of out-of-state counsel is committed to the discretion of the trial judge, such discretion may not be exercised arbitrarily. N.J. Court R. 1:21-2; *Thoma v. A.H. Robbins*, 100 FRD 344, 348 (D.N.J. 1983); *Burlington County Internal Medicine Ass'n v. American Medicorp., Inc.*, 168 N.J. super. 382 (1979). *See also Frazier v. Heebe*, 107 S.Ct. 2607, 2614 n.13 (1987) in which the United States Supreme Court recognized the discretionary nature of *pro hac vice* admission. The exercise of this discretion requires a nonmechanistic evaluation of the factors delineated in the state rule governing *pro hac* admission with respect to that attorney's character and prior admissions, affiliation with licensed in-state

counsel, the existence of an attorney-client relationship, and the lack of local counsel with expertise in the field of law involved, or arguably the facts of the case at bar. *See* Rule 1:21-2(b). Thus, in the context of a criminal defendant's request for the *pro hac vice* admission of counsel of choice, the trial judge must examine the above factors while being mindful of the sixth amendment interest at stake.

When presented with petitioner's request, the trial court stated that

> The matter before the Court calls upon it to exercise its discretion, pursuant to Rule 1:21, as to whether out-of-state counsel should be admitted pro hac in this matter, and I am satisfied . . . that Mr. Pritzker and Mr. Stroup are members in good standing in their respective bars and while the affidavits talk in conclusionary fashion about their specific degree of experience, I am sure that they are experienced able trial counsel. In exercising the discretion that the Court must do, under Rule 1:21 the Court must consider and does consider a number of factors.
>
> * * *
>
> The Court must consider the degree of difficulty presented by the case at hand, the nature of expertise necessary to adequately defend the persons accused of crime, and of course must accord wherever possible the great consideration to the individual wishes of a defendant to choose counsel of his choice. That of course is not an unfettered right. If it were, then Rule 121 [sic], would not in any way, shape or form be constitutional because certainly all the historical developments of admission of practice law in various states has been one which the Federal Courts have accorded a great deference to and have generally not in-

> terfered with. So, clearly, I think the fact that a state perceives to limit out-of-state attorneys to practice is appropriate, as long as it does not enfringe [sic] on any guaranteed constitutional rights and the Rule or the provision of pro hac admission, as exists, I believe in every state of the Union, has never been declared to be constitutionally infirmed.

Transcript of July 9, 1981 at 25-29. Continuing, the court stated that

> The bottom line is to what extent and what weight is Defendant's right to counsel in jeopardy by the Court exercising such discretion? Clearly the policy is if at all compatible with the representation of defendants, to admit competent outside counsel. I can see that and perceive that to be the policy in the Rule.

Id. at 32.

In evaluating the above considerations, the trial court, though explicitly noting the character and experience of these out-of-state attorneys, found that members of the local bar are capable of handling the issues of the case. Specifically, the judge stated that

> The record will reflect that the defendants were arrested in the course of operating their motor vehicle on the Turnpike. There was a search of the motor vehicle . . . [and . . . those of us who practice in the criminal field, Mr. Altman and I note for the record, your particular expertise in that area, we are all familiar with the various exceptions in the State of the law [with respect to constitutional searches], and that perhaps the extensions to which reasonably it may be taken. I mean, on the bare facts of it, I frankly, outside of the fact that this is a lot of

coke, and therefore a lot of money involved and that the term of imprisonment or exposure is greater than you would have otherwise, outside of that, all the indicia surrounding the arrests, nothing out of the normal, does not present any great deal of difficulty, and I'm fully satisfied that there are numerous counsel in the State, not the least of which is Mr. Brown, Mr. Silber's former partner. I know there are some guys around, Mike Querques, any number of others who have, are articulate, able, and imaginative counsel. I don't think there's anybody more imaginative than Mr. Brown in this state. I've been an adversary, I've been a co-counsel of his, I understand. There is a more than adequate number of counsel in regard to this matter.

* * *

The bottom line is, and I say this respectfully, and again as you said, not blowing smoke at anybody, respectfully Mr. Altman, Mr. Cocziello, I've read those motions and I know your reputations, and I can't believe that either one of you are so dumb that you can't perceive the arguments and make those arguments and argue yourself.

So, I'm satisfied there's an adequate degree of expertise available in this state to handle any of these motions.

(Transcript of July 9, 1981 at 27-29, 32).

Moreover, the court stated that the out-of-state status of these attorneys represented potential delays to the processing of this matter due to the likelihood of conflicting professional obligations and need for travel. On the issue of delay, the court stated

I note and I say with some sadness, one of the difficulties in handling out-of-state cases is that

we have a situation here where now months after the indictment and even after the motions were filed, certified to by local counsel, they have not even met their clients or talked to them until apparently this morning, where I see a notarized statement of one defendant. To the extent that local counsel is responsible, local counsel as attorney of record, may at sometime, if out-of-state counsel is unavailable, be compelled to proceed with the matter . . . [But today], we have a situtaion where local counsel is now saying although knowing as of at least late last week, that we were going to proceed without fail tomorrow on the motions, that they are not ready, and perhaps counsel will have to withdraw and certainly if counsel withdraws or is severed from the, or fired from their position as counsel by their clients 'cause they're not comfortable with them,' further delay is built into the system. While it is true that these counsel may well have fine reputations and practice in a number of jurisdictions, there are things like airplanes, there are air, air traffic countrol strikes, for instance, they're eminent, they're going to be, as I perceive it, this case is going to be fought tooth and nail, beginning and end, every adverse ruling will go by way of interlocutory relief. There's nothing wrong in that, but if I don't foresee it in the scheduling of this case, I am a fool. It's going to happen, we're going to be going back and forth.

While it may be true, except when he was on his feet, out-of-state counsel always came when ordered, I'd love to know how many times matters were adjourned because most judges, notwithstanding editorials in the law journal, most judges give a fairly reasonable ear to requests

for adjournment and are you then going to force local counsel on, when out-of-state counsel can't be there. I'd love to know how many times matters have been adjourned. I suspect there are many. If I have in-state counsel, I can pick up the phone and talk to a judge in another jurisdiction and usually work out a much prompter schedule in the disposition of this case. Every matter that it must proceed, if we proceed with out-of-state counsel, require notification of out-of-state counsel, they have to meet with their clients, who do not necessarily reside in their own jurisdictions. There is a built-in two and three-week delay on every communication in this matter. It's just, that's just the nature of the mails, that's the nature of travel, that's the nature of transit in the matter.

Yes, they've been admitted in the Circuit Court of Appeals. I might add that being admitted for Appellate purposes is a lot easier, you know when you are going to get your Appellate argument, the Appellate court is a gentleman's court, able to do things usually with adequate notice and time. The trial court works around a rather changing and liquid schedules and sometimes short notice. I dare say that if I have two New Jersey counsel in a matter and I had to dispose of something important in this matter, a phone call, especially in a case of this significance, would bring counsel promptly within a day or two, at the least. That just simply would be impossible with out-of-state counsel. [Given the presence of counsel from] either DC or Illinois, or wherever, plus local counsel, plus out-of-state defendants . . . [T]here are too many unknowns in that equation. It's going to be difficult just with the out-of-state clients and in-state attorneys to run any-

> thing like a reasonable motion and Appellate schedule, which occur in this case, without adding two lawyers from two different states, who have multiplicity of obligations and to run it all at the same time. We have enough problem in co-counsel cases, now, where, you know, one guy is available, the other guy is not, Judge, what are you going to do, what are you going to do and going to wind up way down the road, a long, long time from now, maybe getting to the case.
>
> I am satisfied that within the context of my discretion, under Rule 121 [sic], that that is a competent and reasonable consideration for the Court to review. I am satisfied the nature of the probable delay, notwithstanding dilatory and intentional, just good faith delay, and it will occur as a result of this matter and difficulty in scheduling Court's disposition, is so grave as to overcome the 'unfettered' right of defendant to counsel of his own choosing, and accordingly, the motion to admit pro hac is denied.

(*Id.* at 39-40). The above excerpts illustrate that the judge denied petitioner's *pro hac vice* motion based upon his assessment of available qualified local counsel and the generalization that the presence of out-of-state counsel poses delays that would not occur when only in-state attorneys are used.

As to the trial judge's first reason, I find that the existence of capable counsel licensed to practice law in the jurisdiction is not a sufficient reason to overcome petitioner's right to counsel of choice. First, this indicates a presumption that in-state counsel are more knowledgable with respect to state law and local rules than out-of-state counsel. This presumption represents an arbitrary distinction between in-state and out-of-state counsel. Certainly, there are instances in which out-of-state attorneys quickly

absorb the relevant state rules while long time members of the bar appear in court without being versatile in the aspects of local law. *See Esposito v. Barnard, et al.*, Nos. 87-3034 and 87-3035 slip op. (3d Cir. March 31, 1988) discussing *Frazier, supra*, at 2612-13. Therefore, such a *per se* distinction is without merit.

Even if I assume that the above presumption has support, the interests advanced by the use of local counsel, i.e., that their familiarity with the local rules enhances the orderly administration of justice, can be achieved by a less extreme mechanism. The legislature has endorsed a state rule that requires any out-of-state counsel desiring to appear in the courts of the state be affiliated with local counsel. Presumably, the requirement reflects the legislature's attempt to enhance the smooth processing of litigation without curtailing an individual's choice of counsel. Thus, through affiliated local counsel, an individual may be represented by counsel of choice without injury to the interest in assuring familiarity with local law, which presumably facilitates the flow of litigation. Therefore, I find that the mere existence of competent in-state attorneys to defend the accused is insufficient to outweigh his sixth amendment right to select his own counsel.

As to the trial court's second basis for denying petitioner's request, I find that the trial court relied upon the belief that the use of out-of-state counsel delays the progress of litigation. The rote application of this kind of blanket generalization "leaves no room for the exercise of discretion." *Alvarez, supra*, 816 F.2d at 817. Rather, it represents the court's failure to scrutinize the particular case at bar. The record indicates that the out-of-state attorneys had not requested any adjournments and were prepared to proceed on the matters then pending before the court. Interestingly, local counsel was unprepared. Moreover, out-of-state counsel never indicated to the court an inability to appear at any time that the court may request. In fact, it is asserted that in the past, these out-

of-state lawyers were unable to appear before judges elsewhere only in circumstances in which they were obliged to appear in court at a conflicting time. Since similar time conflicts could arise with New Jersey attorneys, these examples illustrate that the *pro hac vice* motion was denied based upon a *per se* rule with respect to speculative delays allegedly caused by out-of-state attorney.

Thus, the trial court's view was based, at best, upon speculative delays rather than upon a record which could support a finding that the particular out-of-state attorneys repeatedly impeded the progress of litigation. *See Thoma, supra.* Had the record supported such a finding, and given the strong interest in the swift resolution of criminal disputes, the denial of a *pro hac* motion under such circumstances would have been upheld as rational. In this case, however, the record reveals no dilatory behavior and thus the court's in-state/out-of-state distinction, based purely on geography[2] and speculation, must fall as arbitrary.

Furthermore, this geographical distinction fails to comport with the reality of a highly mobile bar that has at its disposal modern transportation and communication. *See Frazier, supra,* 107 S.Ct. at 2613; *Esposito, supra.* It is in view of these technological modalities that Supreme Court has stated that while *pro hac* admission is not recognized as a constitutionally guaranteed right, the practice of allowing "out-of-state lawyer[s] the privilege of appearing upon motion, especially when . . . associated with a member of the local bar" should be encouraged. *Luis v. Flynt,* 439 U.S. 438, 441-42, 444 n.5 (1979) (*per curiam*).

Therefore, I find that the trial judge denied petitioner's motion based upon a *per se* rule that out-of-state attorneys

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[2] Furthermore, the irony of the court's conclusion that out-of-state attorneys hamper the swift processing of criminal matters is further illustrated by the fact that the instant *pro hac* motion was before the court for two months before resolution and by the fact that over three years lapsed before petitioner pled out.

hinder the efficient processing of a case before the court, and absent a record of dilatoriness on the part of these attorneys, the denial resulted in the arbitrary deprivation of petitioner's right to counsel of choice. Since the infraction of this right "can never be treated as harmless error," *Laura, supra*, 607 F.2d at 58 (quoting *Chapman v. California*, 386 U.S. 18, 23, n.8 (1967)), the nonexistence of prejudice to the petitioner as a result of the denial is irrelevant. *See Rankin, supra*, 779 F.2d at 960. Hence, since the petitioner's sixth amendment right to counsel of choice has been denied, I find that a writ of habeas corpus should issue and the state has thirty days in which to conduct a new trial once the petitioner is placed in the custody of the Attorney General for the State of New Jersey.

An order in conformance with this opinion has been filed by the Court.

APPENDIX E
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 87-2353

GLEN FULLER,

Petitioner,

v.

WARDEN DIESSLIN, Superintendent of the Buena Vista Correctional Facility, Buena Vista, Colorado, and W. CARY EDWARDS, Attorney General of the State of New Jersey,

Respondents.

AMENDED ORDER

For the reasons set forth in the amended opinion filed this day,

IT IS on this 10th day of May, 1988,

ORDERED that petitioner's request for the issuance of a writ of habeas corpus is hereby granted;

IT IS FURTHER ORDRED that the State has thirty days in which to conduct a new trial once petitioner is placed in the custody of the Attorney General for the State of New Jersey.

/s/ Harold A. Ackerman
HAROLD A. ACKERMAN
U.S.D.J.

Received
William T. Walsh, Clerk
May 10 233 PM '88
UNITED STATES
DISTRICT COURT

APPENDIX F

SUPREME COURT OF NEW JERSEY

C-362 September Term 1986

25,931

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

DOUGLAS DAVID CHAPPEE,
Defendant,

and

GLEN FULLER,
Defendant-Petitioner

FILED SUPREME COURT NOV 26 1986
/S/ Stephen Townsend, Clerk

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3996-84T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of November, 1986.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX G

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2442-84T4
A-3996-84T4

ORIGINAL FILED
JUN 19 1986

Elizabeth McLaughlin
Clerk

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

DOUGLAS DAVID CHAPPEE and GLEN FULLER,
Defendants-Appellants.

Argued June 9, 1986 - Decided JUN 19 1986

Before Judges Morton I. Greenberg, J. H. Coleman and Long.

On appeal from the Superior Court, Law Division, Middlesex County.

Alan Silber argued the cause for appellant Glen Fuller (Silber & Rubin, attorneys).

J. Barry Cocoziello argued the cause for appellant Douglas David Chappee (Podvey, Sachs & Catenacci, attorneys; Mr. Cocoziello and H. Richard Chattman, on the brief).

Raymond S. Gurak, Deputy Attorney

General, argued the cause for respondent (W. Cary Edwards, Attorney General, attorney).

The opinion of the court was delivered by GREENBERG, P.J.A.D.

This matter comes on before this court on appeals by defendants Douglas D. Chappee and Glen S. Fuller from convictions and sentences entered on their pleas of guilty in these criminal cases. We consolidate the appeals for disposition in this opinion.

The proceedings started when defendants were indicted in Middlesex County for the following offenses: possession of a controlled dangerous substance, marijuana, *N.J.S.A.* 24:21-20(a)(4) (count one); possession of a controlled dangerous substance, methaqualone, *N.J.S.A.* 24:21-20(a)(1) (count two); possession of a controlled dangerous substance, cocaine of which more than 3.5 grams was free base, *N.J.S.A.* 24:21-20(a)(2) (count three); possession of a controlled dangerous substance with intent to distribute, more than 3.5 grams of free base cocaine, *N.J.S.A.* 24:21-19(a)(2)[1] and *N.J.S.A.* 24:21-19(b)(2) (count four); and unlawful possession of a weapon, *N.J.S.A.* 2C:39-5(d) (count five).

On July 2 and July 9, 1981, defendants moved for admission of counsel *pro hac vice*, Chappee seeking to have John Van Ness, a Colorado attorney, admitted and Fuller seeking to be represented by Keith Stroup, a member of the District of Columbia bar, and his partner, a Mr. Pritzler, a member of the Illinois bar, partners in a four person multi-state firm. Judge Hamlin denied these motions, noting the difficulties in scheduling cases when out-of-state counsel are involved and the complications their admission could cause. Further, the judge considered that the nature of the case was such that in-state counsel could ably represent defendants.

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[1] The correct section is *N.J.S.A.* 24:21-19(a)(1).

On July 17, 1981 defendants moved (1) to suppress evidence recovered from the trunk of the car in which they were riding when arrested; (2) to dismiss part of the indictment based on an alleged unconstitutionality of the New Jersey statute classifying cocaine as a narcotic; (3) to dismiss the indictment by reason of an underrepresentation of women in the position of grand jury foreperson; (4) to sever count five of the indictment; (5) to dismiss the indictment because it contained multiplicious charges, and (6) for Judge Hamlin to recuse himself from hearing the suppression motion as he issued the warrant for the search. The judge at that time made no ruling on the first three motions but denied the last three.

After evidentiary hearings, Judge Hamlin denied defendants' motion to dismiss the indictment based on the allegation there had been discrimination against women in the position of grand jury foreperson on March 8, 1983 and denied the motion to suppress in a written opinion dated August 6, 1983. In denying the motion to dismiss Judge Hamlin pointed out that the duties of a foreperson are ministerial. The motion to dismiss the indictment on the grounds that cocaine was unconstitutionally classified as a narcotic was denied and that issue is not raised on this appeal.

Another significant pretrial proceeding related to a plea agreement offered to defendants providing for maximum incarceration of Chappee and Fuller of two years and six years respectively. Fuller accepted the offer immediately but Chappee hesitated. The State rescinded the offer before it was put on the record and before Chappee accepted or rejected it. Defendants subsequently moved to enforce the offer but on April 29, 1983 Judge Muscatello denied their motion.

Chappee moved for a severance of his case from Fuller's. While this motion was initially granted, on the State's interlocutory appeal on leave granted we reversed and

remanded the matter to the trial court for a hearing, at which the motion was denied.

Pursuant to a plea agreement, reserving to defendants the right to appeal from certain of the pretrial orders, on April 10, 1984 defendants pleaded guilty to count four of the indictment. On November 20, 1984, Fuller was sentenced to a term of 20 years and a fine of $25,000 and on March 18, 1985 Chappee was sentenced to a term of seven years and a $5,000 fine. The remaining counts were dismissed.

Defendants appeal raising the following issues. Chappee asserts:

(1) The consent to search the trunk, sought during custodial interrogation, was invalid under the state and federal constitutions because no *Miranda* warnings or other advisement of the right to counsel and the consequences of the consent were given.

A. Defendants were in custody and subjected to custodial interrogation at the time consent to search was sought.

B. The failure to administer *Miranda* warnings prior to the custodial interrogation in which consent was sought invalidated the purported consent.

1. *Miranda* warnings must precede a request for consent.

2. Regardless of whether *Miranda* warnings are per se a prerequisite to a valid consent, where consent is obtained as the tainted and derivative fruit of a *Miranda* violation, the consent is invalid and the product of the ensuing search must be suppressed.

C. Under the New Jersey Constitution, Article I Paragraph 7, a consent during custodial interrogation is valid only if preceded by warnings adequate to insure an effective waiver and relieve the compulsion inherent in custodial interrogation. These must include advisements of the right to counsel and the consequences of consent.

(2) The conduct of the hearing on the motion to suppress was prejudicially erroneous, and a remand for a new hearing on the motion is required.

A. The preclusion of defendants' proffered expert testimony on the issue of defendant Fuller's lack of capacity in the circumstances to give a voluntary and knowing consent was prejudicially erroneous.

B. The judge presiding at the motion to suppress erred in failing to disqualify himself, since he had issued the search warrant after a testimonial hearing at which he passed on the credibility of one of the State's key witnesses and determined one of the central facts at issue on the motion.

(3) The State's withdrawal of the plea bargain violated New Jersey law and policy; the State falsely induced Chappee and Fuller to waive their constitutional rights; the precedent will cause plea negotiations to become unworkable.

(4) The arbitrary denial of counsel of choice violated defendants' Sixth Amendment rights.